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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOHN DAVID HULL, Defendant and Appellant.	C062239 (Super. Ct. No. 06F09772)

A jury found defendant John David Hull guilty of 12 sex crimes against three children, and the trial court sentenced him to an indeterminate term of 165 years to life in prison, plus a consecutive determinate term of four years.

On appeal, defendant contends evidence of a blood test that showed he had genital herpes, like one of his victims (K), violated his constitutional right to confront the witnesses against him. He also contends the trial court improperly excluded evidence that K could have contracted herpes as a result of earlier abuse by her father, and his attorney was ineffective in not objecting to the prosecutor's argument that

no one else but defendant could have been the source of K's herpes infection. Additionally, he contends the trial court's instruction about Child Sexual Abuse Accommodation Syndrome created an unconstitutional presumption. Finally, he argues that his sentence is cruel and/or unusual and that the trial court erred in imposing two unauthorized fines.

With the exception of his challenge to the fines, we find no merit in defendant's arguments. Accordingly, we will modify the judgment to strike the unauthorized fines and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

The Sexual Abuse Of K

K was born in May 1994. Defendant was her mother's boyfriend and then husband.

K's mother, Stephanie, began dating defendant in August 2000 and moved in with him within a matter of weeks. They lived together with Stephanie's children, including K, in various locations over the next few years, although there were also periods when defendant did not live with Stephanie and her children.

When K was seven or eight years old, she had a nightmare and asked to sleep with defendant on the couch where he slept. She lay down with him, and after a few minutes he started touching and rubbing her vagina. She repeatedly told him to stop, and he eventually did, but he told her if she said anything he would kill her family.

When K was eight or nine, they moved into a transitional living facility known as the KISS house. They lived for a while without defendant, but then moved into part of that facility with him. On one occasion when K was almost nine, while she was taking a bath, defendant touched her vagina and made her touch his penis. On another occasion, he had sexual intercourse with her, although she did not know whether it was vaginal or anal intercourse. She cried and screamed, and he told her to shut up. Before he left, he told her he would hurt her or kill her if she told.

After this incident, K began experiencing pain when she urinated. She was diagnosed with genital herpes.

When K was around 11, they moved to an apartment in Fair Oaks. There, defendant had anal intercourse with her "[m]ostly every day."

In January 2006, K told Stephanie defendant had been raping her; Stephanie called the police and moved out with her children.

The Sexual Abuse Of A

A was born in December 1988. Defendant is her uncle (her mother's younger brother).

From September 2002 through January 2003, while A's mother was in jail, defendant lived with A, A's brother, and their grandmother. When A was 13 years old, defendant called A into the bedroom he shared with A's brother, told her he loved her, "started kissing [her] and trying to stick his tongue in [her]

mouth and touching [her] chest." He tried to reach under her pajama top but she would not let him.

In another incident while A's mother was still in jail, defendant came into the kitchen, pulled A up against him, touched her chest, and put his hand between her legs. While he was touching her breasts, he asked her where her nipples were and told her he wanted her to take her bra off, but she refused.

The Sexual Abuse Of T

T was born in June 1991. He is A's brother, who shared a bedroom with defendant while A and T's mother was in jail. About a month after defendant began living with them, he began to molest T about once a week. The first time, defendant pulled T out of bed, pushed him back against a table, and forced T to orally copulate him. When he was finished, defendant told T not to tell anybody or he would make sure nobody would ever see T again.

The remaining acts of molestation were the same, and it happened more than five times.

The Charges

Defendant was first charged in November 2006. Ultimately, in February 2008, he was charged in a consolidated amended information with 12 counts. As to A, defendant was charged with three counts of committing a lewd act on a child (Pen. Code,[1] § 288, subd. (a)) for touching her chest the first and last

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[1] All further section references are to the Penal Code unless otherwise noted.

times and touching her vagina. As to T, defendant was charged with two counts of committing a lewd act on a child for the first and last times his penis touched T's mouth. As to K, defendant was charged with three counts of aggravated sexual assault of a child (§ 269, subd. (a)(3)) for sodomizing K and four counts of committing a forcible lewd act on a child (§ 288, subd. (b)(1)) for the first and last times he touched her breast and the first and last times he touched her vagina. The information also alleged for purposes of section 667.61 that there was more than one victim.

Blood Draw Evidence

In April 2007, at the request of the prosecutor, the court issued an order permitting the Sacramento County Jail to obtain blood samples from defendant to test for the herpes simplex virus 2 (HSV-2).

At trial, Lisa Mercado testified about defendant's blood draw. Mercado works at Valley Toxicology, a forensic lab that supplies phlebotomists to go into local county jails to perform blood draws. Mercado is the supervising phlebotomist for those who do blood draws at the Sacramento County Jail, and as such she is familiar with the procedures those phlebotomists must follow. She described those procedures for the jury, including how the phlebotomist is supposed to document the blood draw in Valley Toxicology's log book at the jail.

Mercado also testified that some of the samples taken at the jail go to a lab called Quest Diagnostics, and Quest has its own pickup box at the jail. If a sample was supposed to go to

Quest, as soon as the blood was collected the phlebotomist would put the subject's name on the the tube, place the tube in a "baggy" with the appropriate paperwork, and put the baggy in Quest's box, where it would be picked up.

Mercado testified that Allison Bradley was a phlebotomist who was working in the jail in 2007 and used the initials "AB." Bradley was trained on the procedures to follow at the jail, including how to fill out the log book. Referring to a copy of a page from the log book that had been marked as an exhibit (No. 7), the prosecutor asked Mercado what it showed "with regards [*sic*] to the blood draw relating to John Hull." Defense counsel made a hearsay objection. The trial court overruled the objection "based on Evidence Code Section 1271" (the business records exception to the hearsay rule) and *People v. Parker* (1992) 8 Cal.App.4th 110. Mercado then testified that the record showed blood was drawn from defendant's right arm at 5:20 p.m. on April 25, 2007, pursuant to a court order, and Bradley had initialed the entry.

On cross-examination, Mercado admitted she did not participate in or witness defendant's blood draw. She also testified the log book is kept "for Valley Toxicology's own internal recordkeeping" and "in case a prosecution agency needs to use the records in court," that is, "as part of preparing evidence for court."

Later, outside the presence of the jury, defense counsel "flesh[ed] . . . out" his hearsay objection to Mercado's testimony. He acknowledged the prosecutor had established the

foundational elements for the log to come in to evidence under the business records exception to the hearsay rule, but "in light of" the fact that "that paperwork is produced . . . partly for use by a prosecution agency and court," defense counsel argued "that piece of paper constitutes testimonial hearsay as the Supreme Court had given us in the Crawford[2] case and within the meaning of the Sixth and Fourteenth Amendment[s] of the United States Constitution."

Noting there was "a case pending before the United States Supreme Court on a similar issue," the trial court ruled that "this does not violate Crawford."

The next day, Anthony Wong testified about the testing of the blood sample. Wong works for Quest Diagnostics as a unit supervisor for the department of serology. Quest is an accredited private commercial testing laboratory that performs tests on samples sent by doctors' offices. Wong supervises the day-to-day operations of 12 testing personnel.

Wong's unit at Quest tests blood samples for the presence of antibodies of the herpes type 2 virus. Wong told the jury about what happens to a blood sample from the time it is received through the reporting stage and about how the machines are checked to make sure they are operating properly. The prosecutor then showed Wong a document that had been marked as an exhibit (No. 1), and Wong said the second page appeared to be

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2 *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177].

a report that had been generated at Quest regarding a sample from defendant. When the prosecutor asked Wong when the sample was received, defense counsel asserted a hearsay objection. The trial court directed the prosecutor to "[l]ay the foundation." Wong then testified that reports like the one before him are generated and maintained in the regular course of business around the time the sample is actually processed and tested and are double-checked for accuracy.

When the prosecutor asked Wong again about when the sample mentioned in the report was received and tested, defense counsel reiterated his hearsay objection. The court overruled the objection "on the same basis as the objection was overruled yesterday during the course of Ms. Mercado's testimony." Wong then testified the sample was received on April 26, 2007. After some testimony about the training of technicians in the Quest lab, the prosecutor asked what the result of defendant's "herpes HSV type 2 antibody test" was. After the court overruled one more objection, Wong testified "the results for the HSV 2 IGG, which is the herpes type 2 IGG antibody, is [*sic*] positive."

On cross-examination, Wong testified he could not tell the name of the person who conducted the test on defendant's blood sample because the name does not appear on the report generated for the physicians. Wong also testified that Quest keeps records made at or near the time of the test for its own "internal purposes so [they] know what work [they have] done" and "to distribute them to the various agencies that request th[e] testing."

On redirect examination, Wong testified he had reviewed the logs or manual technician sheets dealing with defendant's sample and those records showed that Janice Tacdaras and Angelita Santos Punu were the technicians who worked on his sample.

After Wong, Dr. Kevin Coulter testified as an expert in herpes simplex virus type 2 and how it relates to children in child abuse situations. Dr. Coulter testified that the test results from defendant's blood sample indicated he had been infected in the past with herpes simplex type 1 and herpes simplex type 2.

Outside the presence of the jury after Dr. Coulter testified, defense counsel reiterated his "hearsay objections to Quest Diagnostics as was the case with Ms. [Mercado]," stating that he objected "to the introduction of the results of the testing under the Sixth and Fourth Amendments of the United States Constitution as violating my client's right to confront and cross-examination" because "those reports . . . are prepared in anticipation of use in court by the agency that's submitted them . . . and constitute testimonial hearsay as that was defined within the confrontation clause by the Crawford case." The court overruled the objection based on "the same reasoning and rationale" applied to Mercado's testimony.

Some time later, the trial court admitted the Valley Toxicology log book entry and the Quest Diagnostics lab report into evidence.

Third-Party Culpability Evidence

Before trial, the prosecution filed a motion "to exclude any evidence of the victim's prior [sexual] contacts" and a motion "to exclude any evidence of third party culpability." Both motions were based on the following facts: When K was two years old, her parents (Stephanie and William) separated. Some time thereafter, William visited K at her maternal grandmother's home. While K was sitting on her father's lap, she grabbed the crotch area of his pants and stated, "my pee-pee." The grandmother reported the incident to Stephanie, who called the police, but they told her the case could not be pursued because K was too young to articulate any abuse. When Stephanie moved some time after that, she discovered dolls in the home that had the crotch cut out of the clothing and "'daddy's girl'" written on them. Based on these facts, Stephanie believed William had sexually abused K.

The prosecutor argued "any mention of prior molestation should be excluded" because "[i]n no way are the charged crimes similar to the alleged molestation that occurred when [K] was two-years-old." The prosecutor also argued that "any circumstantial evidence concerning [abuse by William] is not enough to raise a reasonable doubt."

Subsequently, defendant filed a motion under Evidence Code section 782 "to admit evidence to demonstrate that complaining witness K[]'s genital herpes was donated by a source other than

Defendant."[3] According to defendant, William was "a potential donor of K[]'s herpes." The motion was based on a police report that indicated Stephanie had reported that "there were allegations that William molested K[] when K[] was 18-24 mo[nths] of age"; that the "allegations arose when K[] was observed touching William's penis over his clothes while stating 'My penis'"; and that, subsequent to that incident, Stephanie "discovered dolls with the crotches cut out and 'Daddy's little girl' written on the dolls as well as lotions and condoms."

At the hearing on the motions, the prosecutor argued that evidence relating to William's alleged abuse of K could not be admitted under Evidence Code section 782 because K "doesn't remember anything from that time period." As to the third-party culpability aspect of the evidence, the prosecutor argued "there has to be something beyond mere speculation."

In response, defense counsel admitted "[t]he proposed evidence is a bit of an awkward fit with Evidence Code Section 782" and instead "adopt[ed]" the prosecutor's characterization of it as "third party culpability" evidence. Without further elaboration, defense counsel argued the evidence should come in.

The trial court rejected the evidence under Evidence Code section 782 because "the affidavit [wa]s woefully inadequate by way of specificity" and was "highly speculative." On the issue

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[3] Evidence Code section 782 governs the admissibility of "evidence of sexual conduct of the complaining witness [that] is offered to attack the credibility of the complaining witness." (Evid. Code, § 782, subd. (a).)

of third-party culpability, the court concluded it was "highly speculative and really defies logic to take a leap from sitting on dad's lap and indicating my penis to giving a nine-year-old herpes." The court also concluded it "would be highly prejudicial and substantially confusing and misleading to the jury and has such little to no relevance that this Court would make the finding that it is substantially more prejudicial than it is probative." Accordingly, after noting there would be additional problems even if the evidence were admitted because presumably Stephanie "would be coming in to testify," but "this was secondhand information coming from the grandmother," the trial court "exclude[d] any evidence concerning the victim when she was age two with her natural father."

In closing argument, the prosecutor argued "[t]here's only one way that [K] could have learned [about anal sex and that Vaseline can be a sexual lubricant] and that's from [defendant]." The prosecutor also argued that defendant was the "one person that [K's] ever had any kind of sexual contact with."

Child Sexual Abuse Accommodation Syndrome Instruction

Dr. Anthony Urquiza testified for the prosecution as an expert in Child Sexual Abuse Accommodation Syndrome. In the midst of his testimony, following a discussion off the record, the court instructed the jury pursuant to CALJIC No. 10.64 as follows:

"Evidence is being presented to you concerning Child Sexual Abuse Accommodation Syndrome. This evidence is not received and

must not be considered by you as proof that the alleged victim's molestation claim is true. Child Sexual Abuse Accommodation Syndrome research is based upon an approach that is completely different from that which you must take to this case.

"The syndrome research begins with the assumption that a molestation has occurred and seeks to describe and explain common reactions of children to that experience. As distinguished from that research approach, you are to presume the Defendant is innocent. The People have the burden of proving guilt beyond a reasonable doubt.

"You should consider the evidence concerning the syndrome and its effect only for the limited purpose of showing, if it does, that the alleged victim's reactions as demonstrated by the evidence are not inconsistent with him or her having been molested."

In the closing jury instructions at the end of the case, the trial court repeated this instruction.

Verdict And Sentence

The jury found defendant guilty of all 12 charges, except that with respect to the charge of committing a lewd act on A by touching her vagina the jury found defendant guilty of the lesser included offense of attempting to commit a lewd act. The jury also found the multiple victim allegation true.

The trial court sentenced defendant to consecutive terms of 15 years to life in prison for each conviction, with the exception of the attempted lewd act conviction, on which the court imposed the upper term of four years. Accordingly, the

aggregate prison term was 4 years plus 165 years to life. Consistent with the recommendations in the probation report, the court also ordered defendant to pay a $120 fine for crime prevention programs pursuant to section 1202.5 and a $600 fine pursuant to section 243.4.

Defendant timely appealed.

DISCUSSION

I

Defendant's Constitutional Right To Confront The Witnesses Against Him Was Not Violated By The Blood Sample Evidence

Defendant contends the admission of the evidence "regarding the drawing of [his] blood, the testing of that blood, and its testing positive for herpes," "in lieu of the testimonies of the individuals who had actually performed the relevant procedures," violated his right to confront the witnesses against him under the Sixth Amendment to the United States Constitution, as applied in *Crawford v. Washington*, *supra*, 541 U.S. at page 36 [158 L.Ed.2d at page 177] and, more recently, in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [174 L.Ed.2d 314].[4] We disagree.

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[4] The California Supreme Court has granted review in several cases discussing the scope of *Melendez-Diaz*. (*People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted Dec. 2, 2009, S177046; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2009, S176620.)

In *Crawford*, the United States Supreme Court held that under the Sixth Amendment, which guarantees a criminal defendant "'the right . . . to be confronted with the witnesses against him,'" an out-of-court statement that is "testimonial" in nature cannot be admitted into evidence over the defendant's objection unless the person who made the statement is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 40, 42, 68-69 [158 L.Ed.2d at pp. 186, 187, 203].) The court declined "to spell out a comprehensive definition of 'testimonial,'" but stated that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at p. 68 [158 L.Ed.2d at p. 203].)

In *Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2d 224], which also included a second case, *Hammon v. Indiana*, the court qualified the latter part of *Crawford*, holding that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis*, at p. 822 [165 L.Ed.2d at p. 237].) Based on this holding, the court concluded the statement at issue in *Davis* was not

testimonial, but the statements at issue in *Hammon* were. (*Davis*, at pp. 828-831 [165 L.Ed.2d at pp. 240-243].)

Justice Thomas concurred in the judgment in part and dissented in part, agreeing with the conclusion about the statement in *Davis* but disagreeing about the statement in *Hammon*. (*Davis v. Washington*, *supra*, 547 U.S. at pp. 834, 842 [165 L.Ed.2d at pp. 244-245, 249].) According to Justice Thomas, the standard the court adopted was "neither workable nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause." (*Id.* at p. 842 [165 L.Ed.2d at p. 249].) Drawing on his own concurrence in *White v. Illinois* (1992) 502 U.S. 346, 365 [116 L.Ed.2d 848, 865], Justice Thomas stated that "the plain terms of the 'testimony' definition [the court adopted in *Crawford*] necessarily require some degree of solemnity before a statement can be deemed 'testimonial,'" and "[t]his requirement of solemnity supports [his] view that the statements regulated by the Confrontation Clause must include 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" (*Davis*, at p. 836 [165 L.Ed.2d at p. 246].)

In 2009, in *Melendez-Diaz*, the court faced the question of whether "affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine" "are 'testimonial,' rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment." (*Melendez-Diaz v.*

Massachusetts, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 319].) Led by Justice Scalia, four members of the court concluded "[t]here is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements.'" (*Id.* at p. ___ [174 L.Ed.2d at p. 321].) Another four members disagreed, concluding "[l]aboratory analysts who conduct routine scientific tests are not the kind of conventional witnesses to whom the Confrontation Clause refers." (*Id.* at p. ___ [174 L.Ed.2d at p. 350], dis. opn. of Kennedy, J.) Justice Thomas concurred with Justice Scalia's opinion, but wrote "separately to note that [he] continue[s] to adhere to [his] position that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" (*Id.* at p. ___ [174 L.Ed.2d at p. 333].) He explained that he "join[ed] the Court's opinion in this case because the documents at issue in this case 'are quite plainly affidavits,'" and "[a]s such, they 'fall within the core class of testimonial statements' governed by the Confrontation Clause." (*Ibid.*)

With this understanding of the current state of the law in mind, we turn to defendant's arguments. He contends that in *Melendez-Diaz*, the Supreme Court "held that [forensic] laboratory reports . . . are testimonial hearsay evidence within the meaning of Crawford." He further argues that "[g]iven the holdings of Melendez and Crawford, the court below clearly erred in allowing Lisa Mercado to testify regarding the taking of

[his] blood" because "she did not personally participate in or witness" that procedure, and the court also erred in "admit[ting] the Quest Diagnostics blood analysis evidence" because "[t]he Quest analysis is indistinguishable from the certificates of drug analysis described in Melendez."

We disagree with defendant's arguments on all three points. First, the Supreme Court did *not* hold in *Melendez-Diaz* that forensic laboratory reports are testimonial hearsay. As we have explained, in his opinion (joined by three other justices) Justice Scalia concluded "that the documents at issue in this case fall within the 'core class of testimonial statements.'" (*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 321].) The "documents at issue" were not simply forensic laboratory reports, however, but "'certificates of analysis'" that "were sworn to before a notary public." (*Id.* at p. ___ [174 L.Ed.2d at p. 320].) This was significant to Justice Scalia's analysis because although the documents were "denominated by Massachusetts law 'certificates,' [they we]re quite plainly affidavits: 'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths,'" and thus were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" (*Id.* at p. ___ [174 L.Ed.2d at p. 321].) This fact was also significant to Justice Thomas, who concurred in Justice Scalia's opinion *only* because the "certificates" were "'quite plainly affidavits,'" and "[a]s such, they 'fall within the core class of testimonial

statements' governed by the Confrontation Clause." (*Id.* at p. ___ [174 L.Ed.2d at p. 333].)

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (*Marks v. United States* (1977) 430 U.S. 188, 193 [51 L.Ed.2d 260, 266].) Thus, whatever broader ideas about what constitutes a "testimonial" statement might be drawn from Justice Scalia's opinion in *Melendez-Diaz*, under *Marks* the *holding* of the court in *Melendez-Diaz* can be found in Justice Thomas's conclusion that "'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" (*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. ___ [174 L.Ed.2d at p. 333].)

Based on this understanding of *Melendez-Diaz*, the trial court did not err in admitting the blood draw and blood test evidence over defendant's Sixth Amendment objections. That Mercado did not personally participate in or witness the blood draw did not make her testimony, or the page from the log book that was admitted into evidence based on her testimony, inadmissible under *Crawford* or *Melendez-Diaz*. Mercado's testimony itself did not include any out-of-court statement, "testimonial" or otherwise. The closest Mercado came to testifying to an out-of-court statement was when she was asked

to interpret the entry on the page from the log book, but even then she did not testify to an out-of-court statement, she merely interpreted a document. Of course, the document she interpreted *did* contain an out-of-court statement documenting the blood draw from defendant, but that statement was not "testimonial" under Justice Thomas's view of the Sixth Amendment because it was not contained in any formalized testimonial material, such as an affidavit, deposition, prior testimony, or confession; rather, it was contained in a log book created and maintained in the ordinary course of business. Nothing about Mercado's testimony or the page from the log book violated defendant's rights under the Sixth Amendment.

The same conclusion applies to Wong's testimony and the Quest Diagnostics report. Like Mercado's, Wong's testimony did not include any out-of-court statement; instead, he was simply asked to interpret a document -- the lab report -- that contained an out-of-court statement. But the statement contained in the lab report was not "testimonial" under *Melendez-Diaz* because the lab report was not formalized testimonial material -- unlike the "certificates" at issue in *Melendez-Diaz* -- but simply a record created and maintained in the ordinary course of business. Accordingly, admission of Wong's testimony and the lab report did not violate defendant's rights under the Sixth Amendment.

II

The Trial Court Did Not Err In Excluding Defendant's Third-Party Culpability Evidence

Defendant contends the trial court erred in excluding evidence that K "may have been molested by William" because that evidence would have shown that K "could have contracted her herpes infection from someone other than [defendant]" and "could have provided the jury with an explanation -- apart from [defendant's] guilt -- to explain how K[] received her sexual knowledge and the . . . healed tear in her hymen." We find no error.

The admission of third-party culpability evidence is governed by the California Supreme Court's opinion in *People v. Hall* (1986) 41 Cal.3d 826, where the court stated that "[t]o be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Id.* at p. 833.) According to the Supreme Court, "[t]he [trial] court's proper inquiry [i]s limited to whether th[e third-party culpability] evidence could raise a reasonable

doubt as to [the] defendant's guilt and then applying [Evidence Code] section 352." (*Ibid.*)

Applying those principles here, we find no error in the trial court's ruling. In addressing this issue, we initially focus on what *evidence* defendant sought to offer. Defendant argues about what the evidence "would have demonstrated to the jury," but he does not discuss exactly what the proposed evidence was. In his declaration in support of his motion to admit the evidence, defense counsel referred exclusively to a police report that purportedly showed Stephanie had reported to police that "there were allegations that William molested K[] when K[] was 18-24 mo[nths] of age" which "arose when K[] was observed touching William's penis over his clothes while stating 'My penis,'" and that, subsequent to that incident, Stephanie "discovered dolls with the crotches cut out and 'Daddy's little girl' written on the dolls as well as lotions and condoms." At no point, however, did defense counsel indicate exactly whose testimony he intended to elicit to prove these "facts." When the court commented that there would be "serious questions regarding any foundational evidence" "[i]f . . . the defense was going to indicate [Stephanie] would be coming in to testify," defense counsel did not respond or suggest he intended to call any other witness.

Nevertheless, even if we assume for the sake of argument that defendant could have offered the testimony of K's maternal grandmother about the incident she allegedly observed between K and William and the testimony of Stephanie about "her first hand

[*sic*] observations of [K]'s cutout dolls, condoms and lotions," we conclude the trial court did not err in excluding that evidence. To the extent defendant sought to offer the evidence to raise a reasonable doubt about whether he was the source of K's herpes infection, the proposed evidence was irrelevant because it had no tendency in reason to prove William could have been the source of the infection instead. (See Evid. Code, § 210 [relevant evidence is evidence that has a tendency in reason to prove or disprove any disputed material fact].) This is so because there was no evidence proffered that William was infected with the herpes type 2 virus. Absent such evidence, even if the jury reasonably could have concluded that William might have sexually molested K, there was no evidentiary basis for the jury to reasonably conclude he might have infected her with herpes.

To the extent defendant argues the evidence should have been admitted to show that K's "hymenal injury and her knowledge of sexual matters [both] could have originated from a source other than [him]," we still find no error. As for the "hymenal injury," there was testimony that during a physical examination of K a physician "thought that there was a cleft on the hymen." A "cleft" is "generally . . . a healed injury." But the testimony also indicated the exam was "normal," and there was no evidence that specifically attributed this cleft to sexual molestation, whether by defendant or anyone else. Indeed, elsewhere in his brief defendant admits the evidence showed

"[t]here were no serious injuries or abnormalities present that would establish that rape or sodomy had actually taken place."

In any event, even assuming the evidence of a hymenal cleft was suggestive of some form of vaginal penetration of K, the evidence defendant sought to offer did not have any tendency in reason to suggest William might have been responsible for it. Even if K's grandmother did see a two-year-old K touch William's crotch and say "my pee-pee," and even if Stephanie discovered dolls with cut-out crotches and "Daddy's little girl" written on them, as well as lotions and condoms, it still would have been speculation for the jury to draw the inference that William had engaged in sexual intercourse with K and thereby caused the cleft in her hymen.

Finally, as for K's "awareness of sexual matters," this aspect of defendant's argument appears to refer to the comment the prosecutor made in closing argument that the only way K could have learned what anal sex was or that Vaseline can be used as a sexual lubricant was if defendant had abused her. Apparently defendant's contention is that K could have learned these things when she was abused by William, and therefore the evidence relating to William should have been admitted to suggest an alternate source of knowledge. But K's testimony was not that she knew what anal sex was and that Vaseline could be used as a lubricant, but that *defendant* engaged in anal sex with her "[m]ostly every day" and that he used Vaseline when he did so. Defendant fails to explain how the evidence relating to William, which is not necessarily suggestive of any kind of

molestation, let alone of anal sex using Vaseline, could have raised a reasonable doubt about K's very specific allegations of what defendant did to her.

Defendant contends *Lajoie v. Thompson* (9th Cir. 2000) 217 F.3d 663 is similar to this case, but he is mistaken. In *Lajoie*, the appellate court concluded the defendant's rights were "violated when evidence of [the victim]'s past sexual abuse by others was excluded, pursuant to Oregon's rape shield law, . . . for failure to give the required 15-day notice of intent to introduce such evidence." (*Id.* at p. 665.) In *Lajoie*, however, there was "[u]ncontested evidence . . . that [the victim] had been sexually abused by several others and raped by one other man in unrelated incidents." (*Ibid.*) That is far from the case here. Based on defendant's offer of proof, the trial court did not err in excluding the evidence relating to William.

III

Defense Counsel Was Not Ineffective In Failing To Object To The Prosecutor's Argument That Defendant Was The Source Of K's Herpes Infection

Defendant contends the prosecutor engaged in misconduct when she argued to the jury "that no one other than [defendant] could have been the source of K[]'s herpes infection or her knowledge regarding sexual molestation." In defendant's view, "[t]hese arguments were factually misleading because the prosecutor herself had successfully precluded the jury from hearing evidence that K[] may have been molested by William."

According to defendant, his "trial counsel was ineffective in failing to object to this clear misconduct."

A prosecutor's conduct "violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

Here, the prosecutor's argument that defendant was the only person who had had sexual contact with K was not misconduct but fair comment on the evidence. To the extent defendant's claim of misconduct is based on the premise that the prosecutor was wrongfully exploiting the trial court's error in excluding the evidence relating to William, that argument has no merit because we have concluded the trial court did *not* err in excluding that evidence.

Because the prosecutor's argument was not misconduct, defense counsel acted properly when he did not object to it. Consequently, defendant has failed to show that his attorney was ineffective.

IV

CALJIC No. 10.64 Did Not Create An Unconstitutional Presumption

Defendant contends "CALJIC No. 10.64, which instructed the jury how to use the expert testimony which had been presented

regarding Child Sexual Abuse Accommodation Syndrome . . . violated [his] rights to due process of law and a fair jury trial by creating an unconstitutional mandatory presumption or burden-shifting presumption that the alleged victims' accusations were true if their behaviors matched the [syndrome] profile."

The instruction did no such thing. Contrary to defendant's argument, nothing in the syndrome instruction the trial court gave told the jurors that if they "found the reactions and behavior of the alleged victims consistent with the [syndrome] profile of sexually abused children, then [they] should conclude that the sexual offenses described by them in fact occurred." On the contrary, the instruction told the jurors they could "not" consider the syndrome evidence "as proof that the alleged victim's molestation claim is true" and they "should consider the evidence concerning the syndrome and its effect only for the limited purpose of showing, *if it does*, that the alleged victim's reactions as demonstrated by the evidence are not inconsistent with him or her having been molested." (Italics added.) Thus, this instruction was nothing "akin to the error of directing a verdict as to an element of an offense," nor did it "constitute[] an improper intrusion upon the defendant's right to an independent jury assessment on the question of his guilt." The instruction was entirely proper.

V

Defendant's Sentence Is Not Cruel Or Unusual

Defendant contends his aggregate sentence of 169 years to life in prison is unconstitutional under the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution. We disagree.

The People contend defendant forfeited this argument by failing to raise it in the trial court. While that is true, we may nonetheless "reach the merits under the relevant constitutional standards, in the interest of judicial economy to prevent the inevitable ineffectiveness-of-counsel claim." (*People v. Norman* (2003) 109 Cal.App.4th 221, 230.) We choose to do so here.

A punishment may violate the California Constitution if, although not "cruel or unusual" in its method, the punishment "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) Similarly, "an Eighth Amendment analysis requires a finding of 'gross disproportionality' between the offense and the offender and the punishment." (*People v. Norman*, *supra*, 109 Cal.App.4th at p. 230.)

A

Section 269

Defendant first argues that section 269 (aggravated sexual assault of a child) is facially unconstitutional. Section 269 makes it a more serious crime to commit certain forcible sex

offenses (including sodomy) on a child "who is under 14 years of age and seven or more years younger than the" defendant. (§ 269, subd. (a).) The punishment for aggravated sexual assault of a child is "imprisonment in the state prison for 15 years to life." (*Id.*, subd. (b).)

Here, defendant was convicted of three counts of aggravated sexual assault of a child for sodomizing K.

Defendant acknowledges that "[t]he legislative purpose of section 269 was to increase punishment for certain enumerated forcible sexual acts committed against a minor victim," but he contends "[t]he statute is constitutionally defective because it does not recognize significant gradations of culpability depending on the severity of the current offense and it fails to take mitigating factors into consideration." The two cases he cites for this proposition do not support his argument. *In re Grant* (1976) 18 Cal.3d 1 and *In re Foss* (1974) 10 Cal.3d 910 both involved parole eligibility provisions for recidivist narcotics offenders. Neither case is authority for the proposition that a sentence of 15 years to life for a defendant who commits a forcible sex crime on a child under 14 years of age and seven or more years younger than the defendant is cruel and/or unusual.

Defendant next relies on *People v. Estrada* (1997) 57 Cal.App.4th 1270, a case in which the defendant was sentenced to 25 years to life in prison under section 667.61 for forcible rape committed during a first degree burglary where the burglary was committed with the intent to commit the rape. He points out

that in *Estrada* the appellate court "found only two states which provided comparable sentences for aggravated rape." (*Estrada*, at p. 1282.) Then he asserts that "[e]ven if there are a few other states with measures as draconian as California's section 269, it would not save the California statute" because, under *Lynch*, "if the challenged penalty is found to exceed the punishments decreed for the offense in a significant number of [other] jurisdictions, the disparity is a further measure of its excessiveness." (*In re Lynch*, *supra*, 8 Cal.3d at p. 427.)

It is true that one of the three techniques our Supreme Court identified in *In re Lynch* as used by courts to judge the proportionality of the punishment for an offense was comparing the punishment in California with the punishment for the same offense in other jurisdictions. (*In re Lynch*, *supra*, 8 Cal.3d. at p. 425.) It is also true that the part of *Estrada* on which defendant relies here involved the *Estrada* court's application of the third *Lynch* technique to the crime of aggravated rape. That said, there is nothing about *Estrada* that assists defendant. First, the inter-jurisdictional comparison for aggravated rape is irrelevant here. The crime penalized by section 269 is aggravated sexual assault of a child, and at no point does defendant ever undertake an inter-jurisdictional comparison of the punishment for *that* crime. Second, while the *Estrada* court did note only two other states that had comparably harsh punishments for aggravated rape, the court nonetheless concluded "a sentence of 25 years to life for forcible rape in the course of a burglary committed with the intent to commit

forcible rape is neither cruel nor unusual punishment under the California Constitution." (*People v. Estrada*, *supra*, 57 Cal.App.4th at p. 1282.) Defendant fails to explain why a similar result should not follow here with respect to the crime of aggravated sexual assault of a child. Thus, defendant's reliance on *Estrada* is misplaced.

Because defendant does not offer any other arguments regarding the constitutionality of section 269, we reject his challenge to that statute.

B

Section 667.61

Defendant next argues that section 667.61 is facially unconstitutional. "Section 667.61, which provides indeterminate sentences for felony sex crimes committed under particular circumstances, is sometimes called the 'One Strike' law." (*People v. Anderson* (2009) 47 Cal.4th 92, 99.) As relevant here, section 667.61 specifies a punishment of 15 years to life in prison for a person who is convicted in a particular case of committing a lewd act on a child (§ 288, subd. (a)) and/or committing a forcible lewd act on a child (§ 288, subd. (b)(1)) when there is more than one victim (§ 667.61, subds. (b), (c)(4), (c)(8), (e)(5)).

Here, defendant was convicted of two counts of committing a lewd act on A, two counts of committing a lewd act on T, and several counts of committing a forcible lewd act on K.

In arguing that section 667.61 is unconstitutional, defendant makes the identical arguments he made with respect to

section 269 -- that is, he relies on *Grant* and *Foss* to argue that the statute "does not recognize significant gradations of culpability depending on the severity of the current offense and . . . fails to take mitigating factors into consideration," and he relies on *Estrada* to suggest that other states do not punish the same crimes as harshly. We reject these arguments for the same reasons we rejected them with respect to section 269. *Grant* and *Foss* are inapposite because neither case stands for the proposition that a sentence of 15 years to life for a defendant who commits multiple lewd acts or forcible lewd acts on multiple children is cruel and/or unusual. And nothing in *Estrada*, or any where in defendant's argument, provides an inter-jurisdictional comparison of the punishment for defendants who commit such acts under such circumstances. Accordingly, defendant's challenge to the constitutionality of section 667.61 is without merit.

C

Defendant's Aggregate Sentence

In *Lynch*, our Supreme Court identified two techniques other than the inter-jurisdictional comparison of punishments that courts use in evaluating the proportionality of a punishment for an offense: namely, (1) an examination of "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society" (*In re Lynch*, *supra*, 8 Cal.3d at p. 425) and (2) a comparison of "the challenged penalty with the punishments prescribed in the same jurisdiction

for different offenses which, by the same test, must be deemed more serious" (*id.* at p. 426, italics omitted).

Employing these two techniques, defendant contends his "overall" sentence is cruel and/or unusual because it is "grossly disproportionate to [his] crimes and personal circumstances." He points out the following facts about himself and his crimes in support of his argument using the first technique: (1) He was 36 years old at the time of his arrest; (2) He has a high school education and was gainfully employed before he was arrested; (3) He received a score of three on the Static-99, which represents a moderate to low risk of reoffending; (4) He did not employ a weapon in his crimes; and (5) He did not inflict any physical injury on his victims "beyond those inherent in the sexual act[s] themselves."

With respect to the second *Lynch* technique, defendant argues that his sentence "greatly exceeds the sentence of 25-years-to-life imposed on an individual who commits a cold-blooded premeditated murder," not to mention the 15-years-to-life sentence imposed for second degree murder. He also argues that his sentence is out of proportion to the maximum 16-year sentence that can be imposed per victim on "a defendant found to have engaged in continuous repetitive sexual molestation of a child he resides with" under section 288.5.

We are not persuaded. The ultimate question under *Lynch* is whether a particular punishment "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re*

Lynch, *supra*, 8 Cal.3d at p. 424.) Here, neither the facts defendant cites about himself and his crimes, nor the comparison he draws between his punishment and the punishment for other crimes in California, convinces us that his sentence is constitutionally cruel and/or unusual.

That defendant has a high school education and was gainfully employed, and that he did not use a weapon or injure his victims "beyond [the injury] inherent in the sexual act[s] themselves," does not make his sentence unconstitutional. Defendant committed numerous sex offenses against three different victims, all of whom were particularly vulnerable to him. He did these acts over a period of years, in many different locations, and while he did not employ a weapon, he did employ force and threats of harm to the victims and their families. There is absolutely no reason to think he would not do the same sorts of things again if given the opportunity. Nothing about the nature of defendant or his crimes renders his punishment so disproportionate as to shock the conscience, even when particular regard is given to the degree of danger both present to society.

As for defendant's inter-jurisdictional comparison of punishments, the comparison of his aggregate sentence to the sentence for the crime of murder is in apropos because he was not punished for a single crime but for 11 different crimes. Similarly, the comparison of his sentence to the maximum sentence available under section 288.5 is in apropos because he had multiple victims, which is the aggravating factor that

justified imposition of an indeterminate term of 15 years to life for each of his crimes. Furthermore, that defendant might have been charged with three counts of continuous sexual abuse of a child under section 288.5, for a maximum term of 48 years, rather than with the 11 counts he was charged with, does not make his punishment disproportionate. "The express legislative purpose in enacting section 288.5 was to provide 'additional protection' for victims of child molestation by assuring that 'resident' child molesters and others who repeatedly abuse a child over a prolonged period of time would not escape prosecution because of difficulties in pleading and proving with sufficient precision the dates, times, and particular nature of each molestation." (*People v. Rodriguez* (2002) 28 Cal.4th 543, 549.) Where, as here, individual instances of child sexual abuse can be pled and proven, the prosecution is not constrained to aggregate them as a single charge of continuous sexual abuse of a child under section 288.5 or else face an argument that the punishment for the individual crimes is disproportionately severe as compared to the punishment that would have been available if the crimes had been aggregated.

In summary, we conclude defendant's sentence is neither cruel nor unusual.

VI

Fines

The probation report recommended that the court order defendant to pay a $120 fine under section 1202.5 and a $600

fine under section 243.4. Without objection, the trial court ordered defendant to pay those fines.

On appeal, defendant contends he was not subject to a fine under section 243.4 because he was not convicted of violating that statute. He also contends he was not subject to a fine under section 1202.5 because he was not convicted of any of the "enumerated property crimes" set forth in that statute.

The People concede defendant was not subject to either of the statutes the trial court cited, but they contend "the fine amounts of $600.00 and $120.00 should be combined and imposed pursuant to section 288, subdivision (e)" because defendant *was* subject to a fine under that statute. In support of this request, the People cite this court's general power to "modify a judgment or order appealed from" (§ 1260) and the case of *People v. Guiffre* (2008) 167 Cal.App.4th 430, which stands for the proposition that an appellate court "has the inherent power to correct the judgment to reflect what the law requires." (*Id.* at p. 435.)

Here, the law did not *require* the trial court to impose a fine under subdivision (e) of section 288 because the fine provided for in that statute is *discretionary*. Thus, *Guiffre* does not justify the relief the People seek here. Additionally, as defendant points out, where a trial court fails to make a discretionary choice -- such as imposing a fine under subdivision (e) of section 288 -- and the prosecution does not object at the sentencing hearing, "the People have waived the issue and may not raise it for the first time on appeal"

"[b]ecause such an error is 'not correctable without considering factual issues presented by the record or remanding for additional findings.'" (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153.) We conclude the People may not avoid the consequences of their forfeiture/waiver by asking us to recharacterize unauthorized fines the trial court imposed as an authorized fine the trial court could have imposed but did not. Accordingly, the unauthorized fines must be stricken.

DISPOSITION

The judgment is modified to strike the $600 fine imposed under section 243.4 and the $120 fine imposed under section 1202.5. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

ROBIE, J.

We concur:

HULL, Acting P. J.

BUTZ, J.